

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

United States of America,

Case No.: 2:14-cr-00228-JAD-CWH

Plaintiff

**Order Denying Emergency Motion for
Sentence Reduction under
18 U.S.C. 3582(c)(1)(A)(i)**

v.

Charles Edward Cooper, Jr.,

[ECF No. 264]

Defendant

Charles Edward Cooper, Jr. has served roughly six years of his ten-year federal prison sentence for a felon-in-possession-of-a-firearm conviction.¹ He now moves for a compassionate release, arguing that his health conditions put him at greater risk of complications should the COVID-19 virus infiltrate FCI Safford where he is serving his sentence.² Though I am deeply sympathetic to Cooper's situation, I deny his motion because he has not exhausted the Bureau of Prisons' (BOP) process for seeking this relief and the record fails to establish extraordinary and compelling reasons for his early release.

Background

Cooper is serving a ten-year sentence for being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).³ The evidence at his jury trial established that Cooper's firearm possession came to the attention of law enforcement when his girlfriend went to the hospital after he beat her up. The Ninth Circuit affirmed his judgment of conviction.⁴

¹ ECF No. 225 (judgment).

² ECF No. 111.

³ ECF No. 225.

⁴ ECF No. 255.

1 Cooper had an extensive and violent criminal history before this conviction, giving him a
2 criminal history score of 21 and putting him well into the highest criminal history category. As I
3 summarized when imposing the statutory maximum sentence:

4 I think it's impossible to overlook Mr. Cooper's extensive, lengthy,
5 and violent criminal history from the age of 16. This is his ninth
6 felony conviction; he has another 17 misdemeanor convictions. He
7 has a rich history of violence against women and children and drug
8 trafficking and various parole violations, probation revocations,
9 bench warrants, and contempt findings revealing a total lack of
10 regard for the law or any remorse or acceptance of responsibility
11 for any of that history. He has empirically established a likelihood
12 of recidivism and a danger to the community.

13 And, during recorded conversations at jail, he was flagrantly trying
14 to get [his girlfriend] to take the rap for this conduct, which I think
15 further demonstrates a total disrespect or disregard for the law and
16 the criminal justice system and, even more, a lack of remorse.⁵

17 53-year-old Cooper is currently housed at the BOP's Federal Correctional Institution in
18 Safford, Arizona and has a projected release date of January 7, 2023.⁶ He claims (without
19 presenting medical records to corroborate that claim) that he suffers from asthma and chronic
20 sleep apnea and is awaiting a CPAP machine.⁷ He states that he "has requested through
21 electronically written requests to his Unit Team and the Warden at F.C.I. Safford a
22 compassionate release due to his compromised immune system and the unforeseen [sic] Covid-19
23 pandemic, to no avail."⁸ Though he does not attach a copy of those requests, the government
states that it has confirmed that Cooper submitted his request for either home confinement or

21 ⁵ ECF No. 229 at 69 (transcript of sentencing hearing).

22 ⁶ <https://www.bop.gov/inmateloc/> (search for Register Number 49219-048, last visited
23 4/28/2020).

⁷ ECF No. 264 at 1.

⁸ *Id.* at 2.

1 compassionate release on March 31, 2020; the request for home detention was denied, and the
 2 warden has not yet acted on the request for home confinement.⁹ Cooper asks to be released to
 3 live with his “ailing mother who recently had a stroke” and broke her ribs.¹⁰ He claims that he is
 4 unable to provide self-care at Safford because he can’t socially distance.¹¹ And he states that
 5 “there are at least two confirmed cases of Covid-19 in the town of Safford, AZ. It is only a
 6 matter of time before it is introduced into” the prison.¹²

7 The government opposes Cooper’s pro se motion, arguing that his failure to comply with
 8 the statutory exhaustion requirements is fatal to his request and, regardless, he has not shown
 9 extraordinary and compelling reasons for compassionate release.¹³ Cooper’s counsel filed a
 10 reply, asking the court to dispense with the administrative-exhaustion requirement due to the
 11 urgency of the situation and arguing that failure to release Cooper is cruel and unusual
 12 punishment.¹⁴

13 Discussion

14 A sentencing court’s ability to modify or reduce a sentence once imposed is seriously
 15 limited.¹⁵ The compassionate-release provision of 18 U.S.C. § 3582(c)(1)(A)(i), as amended by
 16 the First Step Act of 2018,¹⁶ is an exception to this limitation. It allows the sentencing judge to

18 ⁹ ECF No. 266 at n.1.

19 ¹⁰ ECF No. 264 at 2.

20 ¹¹ *Id.*

21 ¹² *Id.* at 3.

22 ¹³ ECF No. 266.

¹⁴ ECF No. 267.

¹⁵ See *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003) (exploring Federal Rules of Criminal Procedure 35 and 36); 18 U.S.C. § 3582(c).

¹⁶ The First Step Act of 2018, § 603(b), Pub. L. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018).

1 reduce a sentence based on “extraordinary and compelling reasons” after the defendant has failed
 2 to get the BOP to bring such a motion on his behalf.¹⁷ The court must consider the factors in 18
 3 U.S.C. § 3553(a) “to the extent that they are applicable,” and any sentence reduction must be
 4 “consistent with applicable policy statements issued by the Sentencing Commission.”¹⁸

5
 6 **A. Cooper’s failure to exhaust the administrative process for his release request precludes relief.**

7 The court may entertain an inmate’s request for compassionate release under 18 U.S.C. §
 8 3582(c)(1)(A)(i) only (1) “after [he] has fully exhausted all administrative rights to appeal a
 9 failure of the Bureau of Prisons to bring a motion” on his behalf or (2) after “the lapse of 30 days
 10 from the receipt of such a request by the warden of the defendant’s facility, whichever is
 11 earlier.”¹⁹ Cooper represents that he submitted his compassionate-release request to the
 12 warden.²⁰ The government has confirmed that Cooper did so on March 31, 2020, and that his
 13 request for home detention was denied but the warden has not acted on his request for home
 14 confinement.²¹ Cooper thus has not shown that he has exhausted the compassionate-release
 15 process at the BOP, and the 30-day period has not yet passed.

16 Cooper’s counsel argues in his reply that the court should dispense with this
 17 administrative-exhaustion requirement due to the urgency of this pandemic.²² In addressing the
 18 flood of emergency release motions that the pandemic has prompted, courts are split on the
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20 ¹⁷ 18 U.S.C. § 3582(c)(1)(A)(i).

21 ¹⁸ *Id.*

22 ¹⁹ *Id.*

²⁰ ECF No. 264 at 2.

²¹ ECF No. 266 at n.1.

²² ECF No. 267 at 5.

1 question of whether the exhaustion requirement can be disregarded.²³ After evaluating the
 2 growing body of decisions, I side with those who have concluded that the failure to satisfy this
 3 requirement is “a glaring roadblock foreclosing compassionate release”²⁴

4 Section 3582(c) states that “[t]he court *may not* modify a term of imprisonment once it
 5 has been imposed,” except under specified conditions.²⁵ For a motion brought under
 6 § 3582(c)(1)(A)(i), those specified conditions include the exhaustion of administrative remedies
 7 or the BOP’s inaction for 30 days.²⁶ Thus, the exhaustion requirement is imposed by the express
 8 language of the statute itself; it is not judicially created. As the United States Supreme Court
 9 explained in *Ross v. Blake*, while “judge-made exhaustion doctrines . . . remain amendable to
 10 judge-made exceptions[,] . . . a statutory exhaustion provision stands on different footing. There
 11 Congress sets the rules—and courts have a role in creating exceptions only if Congress wants
 12 them to.”²⁷ Courts may not carve out exceptions that Congress did not provide, even “special
 13 circumstances” ones, because “mandatory exhaustion statutes . . . establish mandatory
 14 exhaustion regimes, foreclosing judicial discretion.”²⁸

15 Because Congress prescribed no special-circumstances exception to § 3582(c)(1)(A)(i)’s
 16 exhaustion requirement, *Ross* dictates that this court lacks the power to create one.²⁹ Any
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18 ²³ See, e.g., *U.S. v. Otero*, 2020 WL 1912216, *4 (S.D. Cal. Apr. 20, 2020) (collecting cases).

19 ²⁴ *U.S. v. Raia*, 954 F.3d 594 (3d Cir., Apr. 2, 2020) (holding that failure to comply with §
 20 3582(c)(1)(A)’s exhaustion requirement barred relief).

21 ²⁵ 18 U.S.C. § 3582(c) (emphasis added).

22 ²⁶ 18 U.S.C. § 3582(c)(1)(A).

23 ²⁷ *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016).

²⁸ *Id.* at 1856–58.

²⁹ See, e.g., *Harris v. Harris*, 935 F.3d 670, 676 (9th Cir. 2019) (noting that statutory language
 must be construed “strictly and narrowly”).

argument for creating such an exception is further weakened by the fact that this statutory provision is itself a special-circumstances exception to the court's inability to modify a sentence. Plus, it has its own futility exception "baked into its text,"³⁰ as it permits an inmate to file his motion after 30 days if the warden hasn't acted.³¹ Given Congress's decision to mandate exhaustion and specify this singular, express exception, this court cannot apply an unwritten special-circumstances one to excuse Cooper's failure to exhaust.³² Because Cooper did not fully exhaust the administrative process or wait 30 days before filing this motion, his motion must be denied for failure to exhaust.

B. The record does not contain extraordinary and compelling reasons for Cooper's early release.

Even if Cooper had properly exhausted the administrative process before filing this motion, I would deny it for the separate and independent reason that the record does not demonstrate that his compassionate release is warranted. Although the statute does not define

³⁰ *Ross*, 136 S. Ct. at 1862.

³¹ 18 U.S.C. 3582(c)(1)(A).

³² *See Ross*, at 1856, 1862 (concluding that the Prison Litigation Reform Act's "mandatory language means a court may not excuse a failure to exhaust, even to take [special] circumstances into account"). There are also sound policy reasons to require an inmate to present his COVID-19 compassionate-release request first to the BOP. The Attorney General has empowered the BOP to transfer "suitable candidates" with COVID-19 risk factors to home confinement. https://www.bop.gov/resources/news/pdfs/20200405_covid-19_home_confinement.pdf. The exhaustion doctrine recognizes "that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer" and allows the agencies to apply their "special expertise." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute on other grounds*. "Because defendant is in BOP custody, the BOP is in a better position to initially determine [his] medical needs, the specific risk of COVID-19 to [him] and the inmates generally at" his facility, "the risk to the public if [he] is released and whether [his] release plan is adequate." *U.S. v. Read-Forbes*, 2020 WL 1888856, *4 (D. Kan., Apr. 16, 2020). These concerns are particularly salient here because Cooper's medical conditions are unverified and FCI Safford has no reported COVID-19 cases.

1 “extraordinary and compelling circumstances,” the U.S. Sentencing Commission has identified
2 four categories of situations that may qualify: serious medical conditions, advanced age, family
3 circumstances, and a catch-all “other reasons.”³³ Cooper contends that he falls into the medical-
4 condition category because he is a 53-year-old African-American man with asthma and chronic
5 sleep apnea, putting him at greater risk should he contract COVID-19.³⁴ The Sentencing
6 Commission finds extraordinary and compelling reasons under the medical category when the
7 defendant has a physical, mental, functional, or cognitive impairment “that substantially
8 diminishes” his ability “to provide self-care within the environment of a correctional facility and
9 from which . . . he is not expected to recover.”³⁵

10 Cooper has not demonstrated that his medical situation presents extraordinary and
11 compelling circumstances for compassionate release because he offers no records to support
12 these diagnoses, which must have been made after his 2016 sentencing because his presentence
13 investigation report reflects that he was in good health with no known medical conditions.
14 Even if Cooper has these conditions, the notion that he would be better protected from the virus
15 at his elderly mother’s home in Nevada, where there have been nearly 5,000 positive-test cases,³⁶
16 than at FCI Stafford is speculation. Although the COVID-19 pandemic is undeniably grave and
17 its impacts on every aspect of American life are unprecedented, there are no confirmed cases of
18 the virus at FCI Stafford, as Cooper acknowledges,³⁷ and the BOP has implemented a detailed

21 ³³ U.S.S.G. 1B1.13, application note 1(A).

22 ³⁴ ECF No. 264 at 1.

23 ³⁵ U.S.S.G. 1B1.13, application note 1(A).

³⁶ <https://covidtracking.com/data#state-nv>, last visited 4/29/2020.

³⁷ ECF No. 264.

1 COVID-19 response plan for federal inmates.³⁸ Thus, I cannot conclude that Cooper's health
2 conditions, even in the face of the COVID-19 pandemic, provide extraordinary and compelling
3 reasons for his early release.

4 A sentence reduction for Cooper is also unwarranted under the § 3553(a) factors. His
5 10-year sentence was well justified by his extensive and violent criminal history that includes
6 nine felony and seventeen misdemeanor convictions, violence against women and children, drug
7 trafficking, various parole violations, probation revocations, bench warrants, and contempt
8 findings.³⁹ I found—and maintain—that he was and remains a danger to the community based
9 on his empirically established likelihood of recidivism, his disregard for the law and the
10 criminal-justice system, and his lack of remorse. Cooper's history and characteristics, and the
11 need to promote respect for the law and protect the public from Cooper's crimes all weigh
12 heavily against shaving nearly three years off his custodial sentence.

13 Finally, Cooper has not presented a constitutional basis to grant this relief. His counsel
14 argues in reply that, unless he's released, "he is going to be exposed to a life-threatening virus,"
15 and that "would certainly be cruel and unusual punishment."⁴⁰ This hyperbole is based on the
16 assertion that the protections from COVID-19 for inmates are generally insufficient and opinions
17 about prison populations and practices generally.⁴¹ The information that the government has
18 provided specifically about the BOP's COVID-19 plan, procedures, and practices demonstrates
19 that the BOP is taking precautions to protect Cooper and is actively responding to COVID-19
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21 _____
22 ³⁸ https://www.bop.gov/coronavirus/covid19_status.jsp, last visited 4/29/2020.

23 ³⁹ ECF No. 229 at 69 (transcript of sentencing hearing).

⁴⁰ ECF No. 267 at 9.

⁴¹ *See generally id.*

1 challenges as they evolve. Because he has not shown deliberate indifference to his health or
2 safety,⁴² Cooper's constitutional arguments fail.

3 **Conclusion**

4 IT IS THEREFORE ORDERED that Defendant Charles E. Cooper's Emergency Motion
5 for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) **[ECF No. 264] is DENIED.**

6 Dated: April 29, 2020

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8 U.S. District Judge Jennifer A. Dorsey

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22 ⁴² The Eighth Amendment imposes duties on prison officials to take reasonable measures to
23 guarantee the safety of inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). To establish a
violation of these duties, a prisoner must demonstrate deliberate indifference to a serious threat
to his safety or health. *Id.* at 834.